U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

[redacted]
FDC, P. O. 5010( )
OAKDALE, LA 71463

FEDERAL DET. CENTER-OAKDALE 2
P.O. Box 1128
OAKDALE, LA 71463

Name: [redacted] [redacted]

Date of this notice: 6/25/2008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
COLE, PATRICIA A.
FILPPU, LAURI S.
PAULEY, ROGER

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H. TODD NESOM, ESQUIRE
P.O. Drawer 1131
OAKDALE, LA 71463

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P.O. Box 1128
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Name: [redacted] [redacted]

Date of this notice: 6/25/2008

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Sincerely,

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Chief Clerk

Panel Members:
COLE, PATRICIA A.
FILPPU, LAURI S.
PAULEY, ROGER

File: [redacted] - Oakdale, LA

Date: JUN 25 2008

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Rebecca A. Hollaway
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(I), I&N Act [8 U.S.C. § 1182(a)(6)(A)(I)] - Present without being admitted or paroled

APPLICATION: Termination

The respondent is a native and citizen of Guatemala. The Department of Homeland Security ("DHS") appeals the Immigration Judge's December 12, 2007, termination of proceedings based on the finding that the respondent is mentally incompetent. The appeal is sustained.

At the onset of these proceedings, the Immigration Judge granted multiple continuances to obtain an interpreter fluent in the respondent's dialect of Konjabal and for him to obtain counsel (I.J. at 2). On March 8, 2007, the respondent admitted the allegations and conceded to the charge through counsel, and the Immigration Judge thus found him removable (I.J. at 2; Tr. at 5-6). The merits hearing on the respondent's application for asylum, withholding of removal, and protection under the Convention Against Torture began on July 27, 2007 (I.J. at 3). The respondent's counsel raised the issue of his mental competency and the Immigration Judge continued the proceedings for a medical evaluation (I.J. at 3-4; Tr. at 45-52).[1] The case was then continued several times, during which the parties attempted to contact the respondent's family through the Guatemalan Consulate as a way of discerning whether he had a fear of returning to his country (I.J. at 4). At a December 4, 2007, hearing, the respondent's counsel then withdrew his prior admissions and concessions, asserting that the respondent was not competent to assist him in defending the case (I.J. at 4-5; Tr. at 59-62). Subsequently, on December 12, 2007, the Immigration Judge once again found the respondent to be a native and citizen of Guatemala and sustained the charge based on evidence submitted by the DHS (I.J. at 5; Tr. at 65-68; Exh. 6). Yet, the Immigration Judge terminated the

[1] Contrary to the Immigration Judge's assertion, there is no indication in the record that the DHS stipulated that the respondent was presenting testimony that was not only inconsistent with his asylum application, but also reflective of his mental incompetence (I.J. at 3-4).

[redacted]

proceedings, finding that the respondent's counsel could not provide an adequate defense for him and safeguard his due process rights, since the respondent was unable to articulate whether he had a genuine fear of returning to Guatemala (I.J. at 5-11; Tr. at 69-74).

We agree with the DHS that the Immigration Judge erred in terminating the proceedings. As the Immigration Judge found, the record contains clear and convincing evidence that the respondent is removable as charged (I.J. at 5; Exh. 6). *See* 8 C.F.R. § 1240.8(a). Thus, the respondent bears the burden of establishing his eligibility for relief from removal. *See* 8 C.F.R. § 1240.8(d). Furthermore, the Immigration and Nationality Act expressly contemplates that removal proceedings may be brought against incompetent aliens. Section 240(b)(3) of the Act, 8 U.S.C. § 1229a(b)(3), provides that "[i]f it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien." Along these lines, the governing regulations provide that the attorney, legal representative, legal guardian, near relative, or friend of a mentally incompetent alien shall be permitted to appear on behalf of the respondent. 8 C.F.R. § 1240.4. In this case, as the respondent was represented by counsel, the Immigration Judge should have required counsel to proceed with any claim for relief. Moreover, since the respondent has no legal status in this country, even if he had been *pro se*, it would have been incumbent upon him to seek relief through a legal representative, legal guardian, near relative, or friend. *See id.* We are aware of no court decision striking down this regulation as an inadequate safeguard of an alien's rights to procedural due process. *Cf. Brue v. Gonzales*, 464 F.3d 1227, 1232-33 (10th Cir. 2006) (finding 8 C.F.R. § 1240.4 satisfied where an incompetent alien was represented by counsel); *Schroeck v. Gonzales*, 429 F.3d 947, 951-52 (10th Cir. 2005) (in contrast to criminal proceedings, removal proceedings are civil in nature and the procedural safeguards are minimal because the alien has no right to remain in the United States); *Nee Hao Wong v. INS*, 550 F.2d 521, 523 (9th Cir. 1977) ("the full trappings of procedural protections that are accorded to criminal defendants are not necessarily constitutionally required for deportation proceedings"); *see also Matter of H-*, 6 I&N Dec. 358 (BIA 1954) (hearing not unfair merely because an alien was suffering from mental illness). If the respondent, represented by counsel or any other individual described in 8 C.F.R. § 1240.4, is unable to satisfy his burden of establishing eligibility for relief, the Immigration Judge must deny relief and order removal. For these reasons, we will sustain the appeal, reinstate the proceedings, and remand for a hearing on the respondent's eligibility for relief.

Accordingly, the following order is entered.

ORDER: The appeal is sustained, the proceedings are reinstated, and the record is remanded for further proceedings consistent with this decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Oakdale, Louisiana

File No.: [redacted] December 12, 2007

In the Matter of)
)
[redacted]) IN REMOVAL PROCEEDINGS
)
)
Respondent)

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act as an alien present in the United States without being admitted or paroled.

APPLICATIONS: Asylum under Section 208; withholding under Section 241(b); and withholding under the Convention against Torture.

ON BEHALF OF RESPONDENT:

H. Todd Nesom, Esquire
P.O. Drawer 1131
Oakdale, Louisiana 71463

ON BEHALF OF SERVICE:

Rebecca Hollaway,
Assistant Chief Counsel
1010 E. Whatley Road
Oakdale, Louisiana 71463

ORAL DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL AND FACTUAL HISTORY

The respondent is a native and citizen of Guatemala. The Department alleges that he is subject to removal from the United States because he arrived in the United States at an unknown date and place without being admitted or paroled after inspection by an Immigration officer. These removal proceedings were commenced with the issuance of a Notice to Appear dated October 31, 2006 (Exhibit 1). Initial Master Calendar proceedings were held on

December 1, 2006. The respondent was present without counsel and indicated that he spoke Konjabal. The case was reset for an interpreter. At the hearing on December 5, 2006, respondent appeared without counsel. A Konjabal interpreter (western Konjabal) was present telephonically and the case reset to January 3, 2007 for an attorney. The case was unable to go forward because the Konjabal interpreter did not understand English. So the case had tried to go forward between English, Spanish, and Konjabal, but eventually, the case was reset to January 4, 2007. The respondent indicated that he had an attorney, but as the Court had not received an E-28, the case was reset for receipt of the notice of appearance.

On February 13, 2007, respondent was present, and his attorney enrolled as counsel, however, the case was reset for attorney preparation.

On March 8, 2007, the respondent appeared with counsel, who acknowledged receipt of the Notice to Appear and also admitted the factual allegations on the Notice to Appear. Factual allegations 3 and 4 were stricken from the Notice to Appear in an I-261 dated January 24, 2007 issued (Exhibit 2). Respondent, through counsel, admitted factual allegations 3 and 4 on the Form I-261. Based on the admissions and concessions, the Court finds that inadmissibility had been established by evidence which is clear and convincing. The case was reset for respondent to file the application for relief.

On April 19, 2007, respondent appeared, through counsel, with the Form I-589. However, the application was not ready to present. After allowing counsel and the respondent to speak through the Konjabal interpreter, it became clear that the information in the I-589 was inaccurate, and the case was reset to allow respondent more time to submit a properly completed application. The application was ultimately filed with the Court on June 27, 2007. The respondent had been hospitalized on two other occasions, and on one occasion, the Department failed to present him. However, on the June 27th date, respondent was sworn to the application, and it was signed (or respondent placed his mark on it). The case was reset for hearing on the merits. The issue of whether or not respondent was subject to a one year bar was to go to the merits.

The merits hearing commenced July 26, 2007. Respondent was present with a Konjabal interpreter. Approximately one hour into the respondent's testimony, there were so many inconsistencies between the testimony and the application, as well as internal inconsistencies, that the issue of respondent's competency was raised. His attorney asked that the proceedings stop at that point for some type of medical evaluation or psychological evaluation. It was clear to the Court, as well as the parties present, both for respondent and the Government that this was not merely a matter of inconsistencies but of the respondent's ability to understand and answer the questions that were posed to

him. The case was reset to allow time for a psychological evaluation.

On August 22, 2007, the respondent was not brought to court, but the Department indicated that the psychological evaluation had not been completed. In the interim, the parties had been trying to see if the respondent's case might be resolved in other ways. The Guatemalan Consulate became involved. They were trying to contact the respondent's family, and the parties were going to make an effort through respondent's attorney to evaluate his claim and to determine whether or not the respondent might be seeking voluntary departure rather than pursuing the asylum claim. The purpose of speaking with the family was to determine whether or not the respondent had a fear of harm. The proceedings were further continued to October 23, 2007. The respondent was not presented, but no follow-up information had been able to be obtained from referencing the respondent's family. The case was reset to December 4, 2007.

On that day, the respondent's attorney was present in court with counsel for the Department. The Department indicated that they had been unsuccessful in communicating with the respondent's family, and that the Consulate had been unable to assist them. At this point, based on his assertions that the respondent was not competent to assist him, counsel for the respondent withdrew his prior admissions and concessions because he says that he did not know where the respondent was from or how he actually

entered. He made this assertion because he says that respondent appears not to be able to assist in any way. As all of the admissions had been withdrawn, the case was reset for the Department to present evidence of alienage and for the Court to resolve pleadings.

On December 12, 2007, respondent's counsel appeared on his behalf, and the Department was represented by counsel. The Department presented documents marked as Group Exhibit 6. Based on the documents presented, including the respondent's military ID from Guatemala, affidavits of support filed on respondent's behalf in 1992, and an approved employment application June 1, 1993, and a Form I-589 previously filed, which is dated September 19, 1992, the Court determined that the respondent was not a citizen of the United States but a native and citizen of Guatemala. As the issue of alienage had been settled, it became the respondent's burden to establish that he either had been admitted or was not inadmissible to the Act. See Section 240(c)(2)(B) of the Act. Counsel for the respondent had no proof of admission into the United States. Therefore, based on the presumption of law under Section 291 of the Act, the respondent is presumed to be in the United States in violation of the law. Based on that presumption, the Court finds that the respondent is inadmissible, as charged, under Section 212(a)(6)(A)(i) of the Act. I find that inadmissibility, again, has been established by evidence which is clear and convincing.

Having resolved the issue of inadmissibility, the question, again, arose as to whether or not the case could proceed with a merits hearing because of the respondent's apparent lack of competence. The parties declined to administratively close the case for any type of treatment for the respondent. In fact, the Department stated that it would refuse to provide any type of treatment for the respondent. Respondent's counsel moved to terminate the proceedings because although he is the attorney of record, he says that the respondent cannot help provide any basis for his asylum or withholding claim. He could not articulate whether he had a genuine fear or not. As the Court could not go forward with the merits hearing in its current posture, and the parties refusing to administratively close the case, and respondent's counsel indicating he could not provide any type of adequate defense for the respondent, the Court ordered the proceedings terminated.

The Department had presented several cases in support of its position that the case should go forward. Under 8 C.F.R. Section 1240.4, the regulations do provide that when it is impracticable for the respondent to be present at the hearing because of mental incompetence that the attorney, legal representative, legal guardian, near relatives or friends who were served with a copy of the Notice to Appear shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall

be requested to appear on behalf of the respondent. The question that is posed in this case is one not previously presented to the Court and none of the parties really had an answer for. The issue presented was whether the Court could proceed with an asylum hearing when the respondent lacks mental capacity to understand the proceedings or assist his attorney in the preparation of his case. The sub-issue was whether or not the Department of Homeland Security had any obligation to provide psychiatric care for the respondent, who is detained in their custody.

The Department presented cases, as previously indicated, found at Exhibit 7, which they say are dispositive of the issue. In addition to the cases, the Department presented a letter dated August 23, 2007 from the psychologist at the prison.

The Court notes that the Fifth Circuit Court of Appeals has not addressed this issue squarely. Therefore, the Court reviewed the other circuit case law presented by the Department. The Department presented a First Circuit case, Nelson v. INS, 232 F.3d 258 (1st Cir. October 27, 2000). However, the Court finds that the issue in Nelson is not applicable to the case at bar. The issue raised in Nelson was whether or not the respondent's due process rights had been violated because he did not have a custodian or other party to appear on her behalf. In that case, the respondent's health-related complaints did not rise to a level of mental incompetency that is contemplated by the

regulations.

In the next case, Brue v. Gonzalez, 464 F.3d 1227 (10th Cir. 2006) the respondent was a lawful permanent resident of the United States and a native and citizen of Vietnam. He had arrived in the United States in 1973 and, beginning in 1982, placed in a series of juvenile homes because of behavioral problems. As an adult, he pled guilty in 1992 to sexual assault in the second degree, the victim being a 12-year-old child. He was placed in removal proceedings in 2003 and found removable as an aggravated felon. The Tenth Circuit found that aliens are not necessarily entitled to the full range of due process protections afforded to criminal defendants. But rather, that the procedural safeguards are minimal because aliens do not have a constitutional right to enter or remain in the United States. They held that when facing removal, aliens are entitled only to procedural due process, which provides the opportunity to be heard at a meaningful time and in a meaningful manner.

During the proceedings against Mr. [redacted], the Immigration judge did make any competency findings. The Tenth Circuit ultimately found that the respondent did not show that the removal proceedings caused him prejudice because he was largely able to answer questions posed to him and provide his version of the facts surrounding his past.

The Department also cited a 30-year-old Ninth Circuit case, Nee Hao Wong v. INS, 550 F.2d 521 (9th Cir. 1977). While the

Ninth Circuit concluded that the proceedings could go forward against an incompetent respondent, they found that the respondent's procedural due process rights were protected because he had a conservator who testified on his behalf. The Court finds that the facts in this particular case are not the same as the ones cited by the Department. Based on the Court's observation of the respondent for nearly a year, it was clear to the Court that the respondent could not understand or comprehend the nature of the proceedings that the respondent could not, in any meaningful manner, give answers about his date of birth, place of birth, his family ties, his arrival in the United States, where he lived, where his family in the United States lived. Two applications for asylum had been filed. A review of those applications show that the dates conflict, the information conflicts, and the information conflicted with testimony of the respondent before the Court. Whether this is because of respondent's lack of capacity or because of brain surgery that he had in the United States, it was not clear. The Department did present a five paragraph letter dated August 23, 2007 from the Federal Bureau of Prisons Psychology Data System authored by Dr. [redacted]. However, the Court gives little weight to the document. It was unclear how long the interview lasted. It was equally unclear as to whether or not a Konjabal interpreter was provided to allow the respondent to give information to the respondent. In fact, I believe it was discussed during testimony

that a Konjabal interpreter was not used but a Spanish interpreter. It was clear during the course of the proceedings that while the respondent may understand a little Spanish, he is clearly unable to communicate in any meaningful way in Spanish. Even if a Konjabal interpreter were used, if it were not a Konjabal interpreter who speaks the western dialect as opposed to eastern Konjabal dialect, the respondent would still be unable to communicate. The information in the document conflicts with information that the respondent has provided to the Court. Paragraph four states that the respondent was well-oriented and concentration and memory within normal limits. That may have been for a brief moment before Dr. [redacted], but on every occasion the respondent appeared in Court and with all of his contacts with his attorney and DHS officials his concentration or memory were well-outside normal limits. There did not seem to be any disagreement between the respondent's attorney and counsel for the Department's attorney that the respondent was incompetent. However, it was the Department's position that it was not their responsibility to provide any type of treatment for him even though he was detained in their custody in a federal detention facility, and there are also other facilities in the bureau prison for which the respondent could have been sent for treatment and full psychological evaluation.

The respondent, in this case, does not have a conservator to speak on his behalf. While he has an attorney, the attorney is

basically in name only. The respondent, in no way, because of his mental capacity has been able to assist his attorney in establishing the true nature of any fear of harm to Guatemala or any other concrete facts about the respondent. The respondent was unable to give any information as to the location of any other friends, family, or other relatives who would be able to assist him. The Court finds that in this particular case, the respondent's due process rights would be violated if we continued with the case because, as the case stands now, the respondent could not be heard in a meaningful manner. As the case has been before this Court for well over a year and, in its present posture since the Department refuses to provide treatment for the respondent, it could continue in the same posture indefinitely, the Court decided to terminate the proceedings without prejudice until, if ever, the respondent is able to be heard in a meaningful time and in a meaningful manner; to do otherwise would prejudice the respondent.

Based on the above and foregoing, the following order is hereby entered:

ORDER

IT IS HEREBY ORDERED that the proceedings be terminated without prejudice.

AGNELIS L. REESE
Immigration Judge